

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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GARY METZGAR, RICHARD MUELLER,  
KEVIN REAGAN, RONALD REAGAN,  
CHARLES PUGLIS, SHERWOOD NOBLE,  
DANIEL O'CALLAGHAN,

Plaintiffs,

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL  
NO. 22 PENSION FUND,  
BOARD OF TRUSTEES OF U.A. PLUMBERS AND  
STEAMFITTERS LOCAL NO. 22 PENSION FUND, and  
DEBRA KOROPOLINSKI, in her capacity as Plan  
Administrator, for the U.A. Plumbers and Steamfitters  
Local 22 Pension Fund,

Defendants.

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**DECISION  
and  
ORDER**

**13-CV-85V(F)**

APPEARANCES:

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Attorneys for Plaintiffs  
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BLITMAN & KING  
Attorneys for Defendants  
DANIEL R. BRICE,  
JULES L. SMITH, of Counsel  
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In this ERISA action Plaintiffs allege violations of ERISA's anti-cutback prohibitions and related rules. In its Decision and Order filed August 29, 2017 (Dkt. 77) ("the D&O"), the court granted Defendants' motion to compel complete responses to

Defendants' Interrogatories, particularly Interrogatory No. 4 and to schedule Plaintiffs' depositions ("Defendants' motion") and denied Plaintiffs' cross-motion to consolidate and stay discovery. The court also directed Plaintiffs to show cause why Defendants should not be awarded expenses pursuant to Fed.R.Civ.P. 37(b)(2)(C) and 37(d)(3) in connection with Defendants' motion. Thereafter, Plaintiffs moved for reconsideration of the D&O and stated Plaintiffs' opposition to an award of Defendants' expenses relating to Defendants' motion (Dkt. 83). By Decision and Order filed October 17, 2017 (Dkt. 84), the court found Plaintiffs' failure to provide discovery and schedule Plaintiffs' deposition was not substantially justified nor would such an award be unjust in the circumstances. The court therefore directed Defendants to file Defendants' attorney affidavit of expenses within 14 days or October 31, 2017 with which Defendants' complied by filing on that date an Affirmation In Support Of Award For Attorneys' Fees ("Defendants' Request") (Dkt. 85). Plaintiffs were directed to file Plaintiffs' opposition within 14 days thereafter. However, to date, Plaintiffs have failed to oppose Defendants' Request in compliance with the court's scheduling order.

In Defendants' Request, Defendants asserted that supporting Defendants' motion required 8.55 hours of attorney time for two attorneys – Mr. Jules L. Smith, an experienced attorney – 45 years – specializing in ERISA related legal work and Mr. Daniel R. Brice with 14 years of experience. The billing rate for both attorneys is \$435/hr. Mr. Smith avers that the statement of expenses was carefully reduced to only time incurred by Mr. Smith and Mr. Brice on Defendants' motion, and no time for related matters was included. Significantly, as noted, Plaintiffs' failure to timely oppose Defendants' Request indicates to the court Plaintiffs acquiesce in Defendants' Request. *Roth v. 2810026 Canada Limited Ltd.*, 2017 WL 1337572, at \*2 (W.D.N.Y. Apr. 12,

2017) (declining to reconsider earlier decision granting defendant's attorneys fees request which plaintiffs failed to timely oppose and court considered such failure to be concession as to the reasonableness of defendant's expenses).

### **CONCLUSION**

Based on the foregoing, Defendants' Request is GRANTED. Plaintiffs shall tender Plaintiffs' check in the amount of \$3,719.25 to Defendants' attorneys within 30 days of this Decision and Order.

SO ORDERED.

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

Dated: May 8<sup>th</sup>, 2018  
Buffalo, New York